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OPINION BELOW

The opinion of the Supreme Court of Tennessee, affirming Petitioner's conviction and sentence, is reported at 654 S.W.2d 383.

JURISDICTION

Petitioner seeks review of the judgment of the Supreme Court of Tennessee, affirming his conviction of murder in the first degree and his sentence of death. The judgment was entered on June 27, 1983, and a petition for rehearing was denied on August 1, 1983. The Petition for Writ of Certiorari has been timely filed with this Court, and was received by the Respondent on October 3, 1983. The Supreme Court of Tennessee has indefinitely stayed Petitioner's execution pending the disposition of this proceeding before this Court.

Petitioner seeks review pursuant to 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The victim in this case, Suleiman Showkeir, owned and operated a grocery store and regularly arrived home each night between 10:30 and 10:45. On the night of October 16, 1980, he was ambushed in his carport by Petitioner, who shot Showkeir four times. The assault was apparently planned, since Petitioner was in possession of keys to a car parked near the Showkeir home, and the phone lines to the house had been severed within minutes before the shooting.

There was little doubt as to Petitioner's identity as the murderer, since the victim was able to return his gunfire, and Petitioner was found lying on the floor of the carport in a pool of blood. He was charged with murder in the first degree (felony murder) in an indictment filed on

December 11, 1980, and was recharged in a presentment filed on March 5, 1981. He was found guilty as charged by a jury on April 10, 1981.

At a separate sentencing hearing held on April 11, 1981, the State relied on the evidence it had presented during the guilt phase of the trial. A professor of psychology testified that Petitioner's overall I.Q. was 72, in the borderline retarded range. His I.Q. test results, however, were in the low normal range with respect to nonverbal areas, and he possessed the intelligence to plan, commit, and attempt to cover up the murder. The psychologist also admitted that the "terrible" circumstances under which the I.Q. test was given could have lowered the score.

The trial judge instructed the jury on all of the statutory aggravating and mitigating circumstances set forth in Tenn. Code Ann. § 39-2-203(i) and (j). In sentencing Petitioner to death, the jury specified only one of the statutory aggravating circumstances, i.e., that the murder was committed while the defendant was engaged in committing or was attempting to commit a specified felony. Tenn. Code. Ann. § 39-2-203(i)(7). The jury further found, as required by statute, that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance which they had found. Tenn. Code Ann. § 39-2-203(g).

A direct appeal was taken to the Supreme Court of Tennessee, which affirmed the conviction and sentence. No issues were presented by petitioner concerning selection or qualification of the jurors. Petitioner attacked the constitutionality of the "felony murder" aggravating circumstance on two grounds, arguing that the statute's use of the word "aggravating" requires additional evidence in a case where culpability is based on a theory of felony murder, and that

use of the aggravating circumstance violated double jeopardy principles. He did not, however, contend that the burden of proof had been impermissibly shifted to him. He also argued that the trial judge had erred in instructing the jury on all of the aggravating circumstances even though they were not supported by the evidence, and that his particular circumstances made infliction of the death penalty in his case cruel and unusual punishment.

The Supreme Court of Tennessee rejected Petitioner's attacks on the aggravating circumstance and found that the death penalty in this case did not violate the Eighth Amendment. The court agreed with Petitioner that it was improper for the trial judge to instruct the jury on all of the aggravating circumstances, but found no prejudice to the Petitioner's in the instance case because the jurors clearly relied on the only aggravating circumstance supported by the evidence. State v. Lanev, 654 S.W.2d 383 (Tenn. 1983).

REASONS FOR DENYING THE WRIT

- I. PETITIONER FAILED TO RAISE THE JURY SELECTION ISSUE IN THE TENNESSEE SUPREME COURT, AND THEREFORE THE ISSUE IS INAPPROPRIATE FOR REVIEW BY THIS COURT.

The first issue raised by Petitioner in his application for the writ is his contention that one of the potential jurors should not have been dismissed for cause on the basis of her views about the death penalty. See Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Petitioner did not, however, present this issue to the Tennessee Supreme Court, and that court did not address the issue.

It has long been the settled rule of this Court and other appellate courts that an issue which has not been raised in the lower courts will not be addressed or decided on appeal. United States v. Ortiz, 422 U.S. 891, 898, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975); Walters v. City of St. Louis, 347 U.S.

231, 233, 74 S.Ct. 505, 98 L.Ed. 660 (1954). The rules of this Court governing review on certiorari also clearly contemplate that any issue raised on certiorari has been decided by the state court whose decision is being appealed. U.S. Sup. Ct. R. 17.1(b) and (c).

The lack of a ruling in the lower court on Petitioner's jury selection issue makes review by this Court on certiorari inappropriate and the writ of certiorari should therefore be denied.

II. USE OF THE "FELONY MURDER" AGGRAVATING CIRCUMSTANCE DID NOT VIOLATE PETITIONER'S RIGHT AGAINST DOUBLE JEOPARDY.

Petitioner's argument that use of the "felony murder" aggravating circumstance, Tenn. Code Ann. § 39-2-203(i)(7), violated his right against double jeopardy is patently without merit. The sentencing hearing did not constitute a "trial" for double jeopardy purposes, but rather was simply a punishment proceeding. The fact that the jury relied upon elements of the crime in determining their sentence certainly does not mean that Petitioner was tried twice in violation of the Fifth Amendment. Otherwise no sentencing authority could ever rely on elements of the crime in determining the sentence therefor.

As noted by the Tennessee Supreme Court in the instant case, that court has been presented with a similar argument in the past, and this Court denied review. See Houston v. State, 593 S.W.2d 267, 275-276 (Tenn. 1980), cert. denied 449 U.S. 891 (1980). In another case which has not been appealed to this Court, State v. Pritchett, 621 S.W.2d 127, 140-141 (Tenn. 1981), the Tennessee Supreme Court addressed and rejected an argument nearly identical to the argument raised by petitioner in the instant case, relying on this Court's implicit approval of Florida's very similar aggravating circumstance. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

The State notes that Petitioner has not raised any Eighth Amendment challenge to the use of the "felony murder" aggravating circumstance, which might be based on a lack of premeditation or intent to commit the felony murder. Cf. Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Had that issue been raised, this case would be a poor one on which to decide the question. Although Petitioner was convicted of felony murder, there was clear evidence of premeditation and intent to kill, including obvious proof that petitioner had planned the crime in advance, had carried with him a loaded pistol, and shot the victim not once but four times.

III. THE ISSUE OF WHETHER TENNESSEE'S DEATH PENALTY STATUTE SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT WAS NOT RAISED IN THE LOWER COURT, AND THEREFORE IS INAPPROPRIATE FOR REVIEW ON CERTIORARI.

While Petitioner made several attacks on the constitutionality of the death penalty in the Tennessee Supreme Court, his argument that the burden of proof was shifted to him was not presented there. As noted in Part I above, the issue is therefore inappropriate for certiorari review by this Court.

In any event, it is clear that the Tennessee death penalty statute does not shift the burden of proof to the defendant. The statute specifies that the State must prove the existence of statutory aggravating circumstances beyond a reasonable doubt before the death penalty may be imposed. Tenn. Code Ann. § 39-2-203(f). The Tennessee Supreme Court has so interpreted this statute. State v. Dicks, 615 S.W.2d 126, 130-131 (Tenn. 1981), cert. denied 454 U.S. 933 (1981). The mere fact that the State may rely on evidence adduced at the guilt phase of the trial to carry its burden certainly does not mean that the burden itself has shifted.

IV. THE RECORD SUPPORTS THE FINDING OF THE TENNESSEE SUPREME COURT THAT INSTRUCTIONS TO THE JURY ON UNSUPPORTED AGGRAVATING CIRCUMSTANCES WERE HARMLESS ERROR.

The trial judge instructed the jury at the sentencing hearing on all of the statutory aggravating circumstances set forth in Tenn. Code Ann. § 39-2-203(i), even though most of them were not supported by the evidence. Nevertheless, the jury returned a sentence of death based on a specific finding of one supported aggravating circumstance. The Tennessee Supreme Court correctly found that the instructions were too broad, and commented at length on the proper procedure which should be followed in future trials. The court found, however, that petitioner was not prejudiced by the broad instructions.

We find no prejudice in the present case, however, because the jurors returned a verdict of felony murder, the only aggravating circumstance which the evidence supports. And, although the jury did not state specifically the felony which aggravated the murder, it is clear they intended attempted robbery as that felony. The record shows the jurors were familiar with the indictment which charged the Defendant with murder "during the attempted perpetration of a robbery" The court defined robbery during the instructions at the guilt phase of the trial. The State, in its closing argument at the sentencing hearing, repeatedly referred to attempted robbery as the felony relied upon. From all the record, it is plainly evident the jurors were aware this case involved attempted robbery and not aircraft piracy or kidnapping or arson or any of the other irrelevant felonies in [the felony murder aggravating circumstance].

654 S.W.2d at 388-389.

The State submits that the record supports this factual finding by the Tennessee Supreme Court. Furthermore, the question of whether Petitioner was prejudiced by the erroneous instructions is largely one of state evidentiary law, and therefore is not appropriate for certiorari review by this Court.

V. IMPOSITION OF THE DEATH PENALTY UNDER THE CIRCUMSTANCES OF THIS CASE DID NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

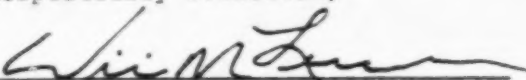
To the extent that Petitioner complains in this issue that mitigating circumstances outweighed aggravating circumstances in his case, the Tennessee Supreme Court has credited the jury's factual finding on this ground. The jury was instructed to consider mitigation on the grounds that Petitioner was intoxicated or mentally incapacitated at the time of the crime, and the jury specifically found that these mitigating circumstances did not outweigh the statutory aggravating circumstances. "The jurors having been instructed, we must assume they considered any diminished capacity of the Defendant before reaching their verdict." 654 S.W.2d at 389. The jury's findings were supported by evidence that petitioner retained sufficient intelligence and sobriety to plan and commit the murder in the instant case.

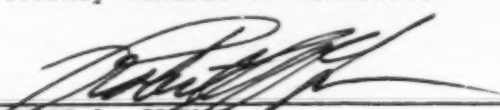
To the extent that Petitioner is alleging that execution of him in his present mental condition would violate the Eighth Amendment, the State responds that his claim is without merit. The Fifth Circuit has recently held that the Eighth Amendment is not implicated in the execution of an allegedly insane person at least where that person is aware of his surroundings, etc. Gray v. Lucas, 710 F.2d 1048, 1054-1056 (5th Cir.), cert. denied ___ U.S. ___, 52 U.S.L.W. 3169 (1983). The Petitioner in the instant case falls far short of meeting the tests discussed in Gray.

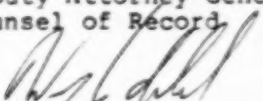
CONCLUSION

For these reasons, the State of Tennessee respectfully requests that the petition for the writ of certiorari be DENIED.

Respectfully submitted,

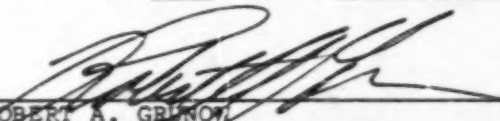

WILLIAM M. LEECH, JR.
Attorney General of Tennessee


ROBERT A. GRUNOW
Deputy Attorney General
Counsel of Record


WAYNE E. UHL
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-7087

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first class U.S. mail, postage prepaid, to Mr. Bob McD. Green, 204 East Unaka Avenue, P.O. Box 28, Johnson City, TN 37601, on this the 1st day of November, 1983.


ROBERT A. GRUNOW
Deputy Attorney General
Counsel of Record